Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

REGINALD AKINS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The Court States Court Of Appeal
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Brief for the Petitioner

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QUESTIONS PRESENTED

Whether Petitioner's rights under the Fifth and Sixth Amendment under the United States Constitution were violated when:

(1) both the District and Circuit Courts ruled that on grounds of stare decisis, *Harris v. United States* precluded imposition of a mandatory five year sentence pursuant to §924(c) that reflect the jury's factual determination that Petitioner possessed rather than brandished a firearm;

(2) the District Court, in imposing Petitioner's sentence, disregarded a jury's factual determination that Petitioner possessed rather than brandished a firearm beyond reasonable doubt and instead made an independent factual determination using the less stringent standard of the preponderance of the evidence, that Petitioner brandished a firearm.

QUESTIONS PRESENTED

Whether Petitioner's rights under the Fifth and Sixth Amendments under the United States Constitution were violated when:

(1) both the District and Circuit Court ruled that on grounds of stare decisis, *Harris v. United States* precluded imposition of a mandatory five year sentence pursuant to § 924(c) that reflected the jury's factual determination that Petitioner possessed rather than brandished a firearm;

(2) the District Court, in imposing Petitioner's sentence, disregarded a jury's factual determination that Petitioner possessed rather than brandished a firearm beyond a reasonable doubt and instead made an independent factual determination using the less stringent standard of the preponderance of the evidence, that Petitioner brandished a firearm.

PARTIES TO THE PROCEEDINGS

Petitioner is Reginald Akins. Respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. B) is reported at 2007 U.S.App.Lexis 679. The sentencing order of the District Court is unreported. (Pet. App. C.)

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 2007. (Pet. App. A.) This petition for Writ of Certiorari was filed on April 9, 2007. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be deprived of life, liberty or property without due process of law."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

18 U.S.C. § 924(c)(1)(A) states, in relevant part:

Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime or violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than five years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT

On or about May 20, 2002, a jury convicted Reginald Akins ("Petitioner") of committing two counts of armed robbery (18 U.S.C. §2113(a) and (d) counts one and two), two counts of knowingly possessing, carrying or using a firearm during the commission of the robberies (18 U.S.C. §924(c), counts three and four), and one count of being a felon in possession of a firearm (18 U.S.C.§922(g)(1), count five). Prior to deliberations, a jury was asked to decide whether Petitioner "possessed, brandished or discharged a firearm" during the commission of the robberies. The jury determined that Petitioner had possessed a firearm but did not brandish nor discharge it.

At sentencing, the District Court imposed a sentence of 384 months or 32 years plus three days. The consecutive sentence was comprised of one day each on counts one and two, 84 months on count three, 300 months on count four, and one day on count five. With respect to count three, the District Court rejected the jury's determination that Petitioner possessed a firearm during the robberies, but found instead, by a preponderance of the evidence, that the firearm had been brandished. Therefore, pursuant to §924(c)(1)(A)(ii),[1] the court imposed an 84 month (seven year) sentence as opposed to 60 months (five years) for possession as determined by the jury.

After appealing his conviction and sentence, the Ninth

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[1] 18 U.S.C. § 924(c)(1)(A) states in relevant part:
Any person who, during and in relation to any crime of violence or drug trafficking crime…uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime or violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than five years;
(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than seven years;
(iii) and if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

Circuit Court of Appeals affirmed them both on June 22, 2004. (*See* 102 Fed. Appx. 88.)

On September 15, 2004, Petitioner filed a petition in this Court for a Writ of Certiorari. This Court vacated the judgment and remanded his case for reconsideration in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 159 L.Ed.2d 158(2004). (*See* 125 S. Ct. 1014).

On July 26, 2005, the Ninth Circuit ordered the District Court to reconsider its sentence for purposes of determining whether it would be materially different under *United States v. Booker*. (Pet. App. D).

Relying upon *Apprendi v. New Jersey*, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct. 2348(2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403(2004) and *Booker*, Petitioner contested the District Court's reliance on its factual determination that Petitioner had brandished the firearm, rather than accepting the jury's factual determination that he had possessed the firearm. As the Court's factual determination was not based solely on "the facts reflected in the jury's verdict," *Blakely v. Washington*, 542 U.S. at 303, Petitioner argued that the Court "exceeded [its] proper authority," by imposing an 84 month sentence that exceeded by two years the 60 months that more accurately reflected the "jury's verdict alone." *Id.* Thus, in light of *Apprendi*, *Blakely* and *Booker*, Petitioner urged the District Court to re-sentence him to 60 months on count three. (Pet. App. E).

At the February 1, 2006 resentencing hearing, District Court Judge Charles R. Breyer, in reviewing the arguments for and against the imposition of a different sentence under *Booker*, stated "...I think that there is something to be said for giving him a sentence that doesn't include the brandishing. Even though I saw evidence of brandishing, it was not a jury determination. And so, I—I think he is entitled to resentencing." (Pet. App. F at 4.) Judge Breyer further stated that a two year difference in Petitioner's sentence was indeed material and "a 360 month sentence as distinct from a 384 month sentence [was] more reasonable." (Pet App. F at 4). When reminded that at the time of the original sentencing *Blakely* and *Booker* had not been decided, Judge Breyer stated that "...had I been aware

of *Blakely* at the time I sentenced Mr. Akins, and further, had the jury rejected the brandishing finding, notwithstanding my disagreement with the jury—or maybe not, maybe I would have agreed with the jury."(Pet. App. F at 15). Even more affirmatively, Judge Breyer stated "Because having the jury hear it, having it being (sic) presented to the jury and the jury not adopted (sic) it, you know, I—I wouldn't accept it." (Pet. App. F at 16).

At the March 8, 2006 resentencing hearing, Judge Breyer declared if "under all the circumstances and if I were to apply 3663(A)[sic] to the sentencing, I may very well enter a different sentence if I had discretion to do so. I don't think I do. I may be wrong. As a matter of fact, I hope I'm wrong." (Pet. App. G at 3).

Thus, in his order of March 8, 2006, Judge Breyer held that although he was in agreement with the Ninth Circuit that *Harris v. United States*, 536 U.S. 545, 153 L.Ed.2d 524, 122 S.Ct. 2406 (2002) is "difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence," (Pet. App. C at 2) he was bound to follow it as he was bound to follow the Ninth Circuit's decision in *Dare v. United States*, 425 F.3d 634 (9th Cir.2005) which held that *Harris* had not been expressly overruled. Thus, Judge Breyer held that "if [he] had the discretion to do so, [he] would resentence Akins." (Pet. App. G at 3).

Reasoning that *Blakely* and *Booker* did indeed provide Judge Breyer with the discretion to re-sentence Petitioner to 60 months on the §924(c) conviction, Petitioner appealed the District Court's order to the Ninth Circuit Court of Appeals on or about March 17, 2006.

On or about January 9, 2007, the Ninth Circuit filed an unpublished opinion affirming the District Court's order. In its opinion, the Ninth Circuit relied exclusively upon its earlier decision in *United States v. Dare*, 425 F.3d 634 (9th Cir. 2005) in which it "upheld the continued use of mandatory minimum sentences based on judicial factfinding as allowed by the Supreme Court's opinion in *Harris v. United States*, 536 U.S. 545, 568 (2002)."(Pet. App. B). However, the Ninth Circuit also stated in *Dare* that it found it difficult to reconcile *Harris*

with "the Supreme Court's recent Sixth Amendment jurisprudence" but nonetheless, it was required to follow *Harris* because it had not been expressly overruled by this Court. *Dare*, 425 F.3d at 641.

It is upon this confusion expressed by the Ninth Circuit in *Dare*, as well as other Circuit courts, that Petitioner respectfully requests that this Court definitively pronounce that the reasoning in *Apprendi*, *Blakely* and *Booker* had effectively overruled the reasoning in *Harris v. United States* and that therefore, the distinction made heretofore between "minimum" and "maximum" sentences, can no longer coexist with a defendant's Sixth Amendment rights as interpreted by this Court's *Apprendi*, post-*Harris* jurisprudence.

PREFACE

Using stare decisis, both the District Court and the Ninth Circuit Court of Appeals have refrained from answering the question of whether the reasoning in *Apprendi* as carried forth by *Blakely v. Washington*, *Booker v. United States*, and most recently in *Cunningham v. California*, 549 U.S.___, 127 S.Ct. 856, 166 L.Ed.2d 856(2007) has in fact overruled *Harris v. United States*. These two lower courts effectively, "passed the buck" by expressly stating that even though it appeared that *Harris* was no longer sound law after *Blakely* and *Booker*, they were nevertheless bound by it due to this Court's silence on the precise issue of *Harris'* viability. Specifically, the District Court, in rejecting Petitioner's arguments that *Blakely* and *Booker* required a jury's beyond a reasonable doubt determination of whether Petitioner possessed or brandished a firearm, stated "if [he] had the discretion to do so, [he] would resentence Akins" to five rather than seven years to reflect the jury's finding. However, "as a District Court... [he] was bound by *Dare*... [and] does not have the discretion to resentence Akins until the the Ninth Circuit orders otherwise." (Pet. App. C at 2). Similarly, the Ninth Circuit refused to revisit its opinion in *Dare*; it too "passed the buck" when it stated in *Dare* that the reasoning in *Harris v. United States* "is difficult to reconcile with the Supreme Court's recent Sixth Amendment

jurisprudence," 425 F.3d at 641 but that nonetheless it must follow *Harris* because it has not been expressly overruled by the Supreme Court.

Several other Circuits have also expressed concern that *Harris* is no longer "good law" but that they were also bound to apply it when, and until this Court expressly states otherwise. See, *United States v. Jones*, 418 F.3d 726, 732(7th Cir.2005) (although there may be some tension between *Booker* and *Harris*, as to the extent that *Booker* has unsettled *Harris*, it is the Supreme Court's prerogative--not ours to say so); *United States v. Groce*, 398 F.3d 679, 682, n.2 (4th Cir. 2005) (sentences pursuant to *Harris v. United States* are problematic after *Booker*); *United States v. Williams*, 464 F.3d 443, 449(3d Cir. 2006)(*Harris* survives because *Booker* did not explicitly overrule *Harris* nor did *Booker* "make any reference to *Harris*"); *United States v. Mackie*, 157 Fed. Appx. 378(2d Cir. 2005)(unreported opinion)(regardless of the merits of this argument, we must reject it...as this Court must adhere to Supreme Court precedent unless and until the Supreme Court itself overrules it). Although other Circuits have definitively concluded that *Harris* remains "good law" after *Blakely* and *Booker*, it is true that this Court has not yet definitely spoken on the issue.

Thus, when coupling the existing uncertainty on the continuing viability of *Harris* after *Blakely* and *Booker* with the inherent restraint shown by Circuit courts and justified on grounds of stare decisis,[2] the due process rights of defendants, like Petitioner, are being inexcusably compromised. [3]

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[2] See, for e.g., *United States v. Duncan*, 413 F.3d 680, 683(7th Cir. 2005)(even if the logic and spirit of those decisions could be interpreted to have eroded the Court's previous rationale for permitting mandatory minimum sentences based on judicial factfinding, it is certainly not our role as an intermediate appellate court to overrule a decision of the Supreme Court or even to anticipate such an overruling by the Court). But see, *Utah v. Nevada Co. v. DeLamar*, 133 F.113, 120 (9th Cir. 1904)(Supreme Court has since, as well as before laid down the rules by which we must be guided; and, if there is a conflict between them, the later decisions must govern and control our actions); *Burnet v. Coronado Oil & Gas Co.* 285 U.S. 393, 406, fn.1(1932)(no interest which could be served by so rigid an adherence to stare decisis is superior to the demands of a system of justice based on a

Nevertheless, Petitioner now stands at the door of the forum that is charged with the constitutional authority to definitively decide the viability of *Harris* after *Blakely* and *Booker*. As the following arguments will attest, *Harris'* distinction between "minimum" and "maximum" sentences can no longer co-exist with both the reasoning inherent in this Court's *Apprendi* and post-*Harris* Sixth Amendment jurisprudence, as well as with *Booker's* repudiation of the "mandatoriness" of the now advisory Sentencing Guidelines.

See, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 857, 1125 S.Ct. 2791, 2810, 120 L.Ed.2d 674(1992)(a decision is properly overruled where development of constitutional law since the case was decided has implicitly

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considered and consistent application of the constitution); Paulsen, Michael Stokes, Accusing Justice: Some Variations on the Themes of Robert M. Cover's, "Justice Accused," 7 J.L. & Religion 33, 85 (1990)(while it might be thought a breach of decorum for an inferior court to repudiate a precedent of a superior tribunal, such conduct is not constitutionally insubordinate and is clearly not categorically improper); Camiker, Evan, Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decision Making, 73 Tex. L. Rev. 1, 17-18(1994)(sometimes the demise of an old Supreme Court precedent is foreshadowed by newer binding precedents that are inconsistent with the reasoning or result of the old case. In such circumstances, an inferior court might conclude that the newer precedents implicitly overrule the old. Because the inferior court reaches this conclusion simply by interpreting binding precedents, the court can fairly be characterized as following the precedent mode); See also, *Cooper v. MRM Inv. Co.*, 367 F.3d 493(6th Cir. 2004)(precedent making decisions...may be overruled...by implication so that a later decision overrules prior decisions which conflict with it whether such prior decisions are or are not mentioned).

[3] See, *United States v. Reveron-Martinez*, 836 F.2d 684, 693(1st Cir. 1988)(in the criminal context, mechanical application of stare decisis can deprive a defendant of a more fundamental due process interest, the right to a day in court); *Northwest Forest Resource Council v. Dombeck*, 107 F.3d 897(D.C. Cir. 1997)(to the extent that a rigid application of stare decisis deprives one of their right to an opportunity to be heard, it raises a due process issue); See also, Barnett, Amy Coney, Stare Decisis and Due Process, Univ. Co. La. Rev., Vol. 74, p. 1011, 1015(2003)(to the extent that a court applies the rules of stare decisis in a way that makes it impossible for a litigant to convince a court to overrule erroneous precedent, the court deprives that litigant of a hearing on the merits of her claim);

or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking).[4] Thus, Petitioner respectfully requests that this Court expressly state what has otherwise been implicitly understood, that *Harris v. United States* has been overruled by its holdings in *Blakely* and *Booker*.

SUMMARY OF ARGUMENT

As this Court most recently reaffirmed in its holding of *Cunningham v. California*, 127 S.Ct. 856, the Sixth Amendment requires that "*any fact* that exposes a defendant to a greater potential sentence must be found by a jury, and not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 127 S.Ct. at 868(Emphasis added). Petitioner argues that the language relied upon in *Cunningham* in defining the reach of the Fifth and Sixth Amendments, clearly illustrates that the distinction the Court otherwise relied upon in *Harris v. United States* where, a defendant's constitutional rights were triggered depending on whether the elevated sentence was the minimum or maximum, is no longer the standard the Court adheres to. Beginning with *Apprendi* and continuing through *Blakely* and *Booker*, this Court, by reaffirming its reliance upon the principles underlying the Fifth and Sixth Amendments, has incrementally broadened the language used in articulating the scope and reach of the Amendment's protections. *Booker* 240 (more important than the language used in...*Apprendi* are the principles we sought to vindicate. Those principles are...not the product of recent

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[4] See also, *United States v. Gaudin*, 515 U.S. 506, 521, 115 S.Ct. 2310, 2319, 132 L.Ed.2d 444(1995)(stare decisis may yield where a prior decisions underpinnings have been eroded by subsequent decisions of this Court); Douglas, Stare Decisis, 49 Colum.L.Rev. 735, 736(1949)(a judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he [or she] remembers above all else that it is the constitution which he [or she] swore to support and defend, not the gloss which his predecessors may have put on it).

innovations in our jurisprudence, but rather...in the ideals our constitutional tradition assimilated from the common law).[5]

In particular, the Court's change in definition of "mandatory maximum" from "the prescribed statutory maximum" in *Apprendi*, 530 U.S. at 490 to "facts reflected in the jury verdict or admitted by the defendant," in *Blakely*, 542 U.S. at 304 clearly illustrates the Court's movement after *Harris*, towards restoring to the jury's purview, factual determinations that increase a defendant's sentence as required of that body under the Sixth Amendment. Additionally, as first articulated by Justice Thomas in his concurrence in *Apprendi*,

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[5] The Third Circuit Court in *United States v. Grier* has very recently summarized this Court's articulation of some of the relevant principles underlying the protections embodied within the Fifth and Sixth Amendments.

> It has been settled throughout our history that the Constitution protects every criminal defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 365, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). It is equally clear that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511, 132 L.Ed.2d 444, 115 S.Ct. 2310(1995). These basic precepts, firmly rooted in common law, have provided the basis for recent decisions interpreting modern criminal statutes and sentencing procedures. The Constitutional guarantees of "trial...by an impartial jury," U.S. Const. Amend. VI, and "due process of law, U.S. Const. Amend. V, stand as a bulwark of individual liberty. They interpose between the legislature and the court the community's own judgment as to the existence of a crime. Only if a jury of an individual's peers concludes beyond a reasonable doubt that he or she committed each element of the charged offense, as defined by the legislature, may the court impose punishment. *Booker*, 543, U.S. at 230. This principle is rooted in common law considerations of fundamental fairness. *Blakely v. Washington*, 542 U.S. 296, 301-02, 305-07, 311-12, 124 S.Ct.2531, 159 L.Ed 2d 403(2004)...Under the Fifth and Sixth Amendments, individuals have a right to demand that each and every element of the alleged crime be submitted to a jury and proved beyond a reasonable doubt before sentence is imposed."

United States v. Grier, 2007 U.S. App. Lexis 2483.

the Court's implicit adoption of the broader definition of an "element of a crime," i.e., "whatever is in law essential to the punishment sought to be inflicted," *Apprendi*, 530 U.S. at 467(Thomas, J. concurring, (as cited in *Blakely*, 542 U.S. at 304 and *Booker*, 543 U.S. at 233) again illustrates the Court's change in perspective since *Harris*. As a significant justification for its holding in *Harris*, this Court's analysis of whether a fact was an "element" or a "sentencing factor" relied upon a more narrow definition than the one subsequently embraced by this Court in *Blakely* and *Booker*. Thus, this change irrevocably impacts its holding in *Harris* and as such, *Harris* is no longer good law and therefore, should be expressly overruled.

Petitioner also argues herein that the rationale underlying this Court's express repudiation of the "mandatory" nature of the Federal Sentencing Guidelines equally applies to mandatory minimum sentences, and thus, this Court's holding in *Booker* also serves to overrule its earlier holding in *Harris v. United States*. See, *Booker*, 543 U.S. at 236(the new sentencing practice forced the Court to address the question how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime[s] [including mandatory minimums]).

ARGUMENT

I.

WITH THE COURT'S CLARIFICATION OF ITS HOLDING IN *APPRENDI*, *HARRIS* HAS BEEN EFFECTIVELY OVERRULED.

In *Harris v. United States*, petitioner challenged the District Court's imposition of a seven year sentence pursuant to §924(c) when the fact used by the Court, i.e., that he brandished a firearm, had not been alleged in the indictment nor proven at trial. Rather, the judge unilaterally found by a preponderance of the evidence that petitioner brandished a firearm. Pursuant to §

924(C), brandishing exposed a defendant to a seven year sentencing enhancement. Petitioner argued that the Court's finding violated his Fifth and Sixth Amendment rights as articulated by this Court in *Apprendi*. *Harris*, 536 U.S. at 551.

In *Harris*, this Court primarily focused on the distinction between an "element" and a "sentencing factor"; it held that the former, not the later required constitutional guarantees of a jury and proof beyond a reasonable doubt. *Harris*, 536 U.S. at 549. The Court was quick to add however that not all facts effecting punishment were elements although they might impact a defendant's sentence; i.e., a judge could impose a sentence within a range provided by statute and could rely upon facts pertaining to the defendant and the manner in which the offense was committed in rendering an appropriate sentence. The Court held that "though these facts may have a substantial impact on the sentence, they [were] not elements," and thus "not subject to the Constitution's indictment, jury and proof requirements." *Harris*, 536 U.S. at 549. The Court made this distinction early on in the opinion in order to distinguish the assertion made in *Apprendi*, in particular, by Justice Thomas in his concurrence, in which he argued that it was well established in common law that if a statute increased the punishment of a common law crime on some fact, then that fact must have been charged in the indictment; that the indictment must allege "whatever is in law essential to the punishment sought to be inflicted."[6] *Harris*, 536 U.S. at 467, 506 (Thomas, J. concurring). In other words, any fact that increases a punishment is an "element" and thus, a defendant is afforded Fifth and Sixth Amendment protections when that "element" is relied upon to increase a sentence. *Apprendi*, 530 U.S. at 501(a "crime" includes every fact that is by law a basis for imposing or increasing punishment)(Thomas, J. concurring). If the *Harris* court recognized and accepted this analysis, the distinction it

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[6] An accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," *Apprendi*, at 510, citing, 1 J. Bishop, Criminal Procedure § 87, p 55 (2d ed. 1872). Thus, "a crime includes every fact that is by law a basis for imposing or increasing punishment ," *Apprendi*, 530 U.S. at 501.

ultimately made between facts extending statutory minimums and facts increasing statutory maximums would have been logically unsound.

Nevertheless, the Court found that brandishing was a traditional sentencing factor. *Harris*, 536 U.S. at 553-557. The Court then addressed the question of whether *Apprendi* overruled *McMillan v. Pennsylvania,* 477 U.S. 79, 91 L.Ed.2d 67, 106 S.Ct. 2411(1986). *McMillan* involved a constitutional challenge to Pennsylvania's Mandatory Minimum Sentencing Act. That statute, like the statute in question at bar, dictated that anyone convicted of certain felonies was subject to a mandatory minimum sentence of five years if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense. McMillan, 477 U.S. at 81-82. This Court found the statute constitutional, holding that the statute "operated solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding." Id. at 88.

As the *Apprendi* rule did not exist at the time McMillan was decided, it is in *Harris* that this Court first embraces the *Apprendi* rule in order to rebut petitioner's argument that facts extending statutory minimums must be determined by a jury beyond a reasonable doubt. The *Apprendi* rule states that "other than a fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt," *Apprendi*, 530 U.S. at 490. The *Harris* court concluded that facts extending statutory minimums were unaffected by *Apprendi* in that the jury's verdict itself authorized the judge to impose sentence anywhere within the statutory range up to the maximum. *Harris*, 536 U.S. at 557. The Court stated that a judge's ability to determine a fact in order to extend a statutory minimum was no different than the ordinary discretion he or she had in sentencing within the statutory range; as long as the fact did not "swell the penalty above what the law has provided for the acts charged." *Harris*, 536 U.S. at 561-562. On the other hand, the *Apprendi* rule did apply to facts that extended a sentence beyond the statutory maximum as such facts "had

traditionally been charged in the indictment and submitted to the jury because the function of the indictment and jury had been to authorize the State to impose punishment." *Harris*, 536 U.S. at 564. Thus, *Harris* concluded,

> whether chosen by the judge or the legislature, the facts guiding judicial discretion below the statutory maximum need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. When a judge sentences the defendant to a mandatory minimum, no less than when the judge chooses a sentence within the range, the grand and petit juries already found all the facts necessary to authorize the Government to impose the sentence. The judge may impose the minimum, the maximum, or any other sentence within the range without seeking further authorization from those juries and without contradicting *Apprendi*.

Harris, 536 U.S. at 565.

In his dissent in *Harris*, Justice Thomas, referring to the historical analysis set out in *Apprendi*, stated that the *Harris* majority's emphasis on penalties that exceed the statutory maximums and unwillingness to extend *Apprendi* to statutory minimums, when measured against the "vital constitutional liberties [could] not withstand close scrutiny." *Harris*, 536 U.S. at 574 (Thomas, J., dissent). Justice Thomas argued that although it was true that *Apprendi* concerned a fact that increased a penalty beyond the prescribed statutory maximum, "the principle upon which it relied appl[ied] with equal force to those facts that expose[d] the defendant to a higher mandatory minimum: When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is by definition an element of a separate legal offense. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.* at 579. Thus, as brandishing a firearm "indisputably alter[s] the prescribed range of penalties

to which [a defendant is] exposed under §924(c)(1)(A)" and thus, is analogous to an aggravated crime with the aggravating fact itself an element of that crime, Id. at 576, the Fifth and Sixth Amendments irrefutably require that "brandishing" be charged in the indictment and proved beyond a reasonable doubt." *Id.* at 480.

In *Blakely v. Washington*, petitioner was charged with second degree, B-felony kidnapping which carried a maximum 10 year sentence. Similarly, the Washington State Sentencing Guidelines ("Guidelines") imposed a guideline range of 49 to 53 months. *Blakely*, 542 U.S. at 299. The Guidelines also specified that a judge could impose an above the standard-range sentence if he found a "substantial and compelling reasons justifying an exceptional sentence." *Id.* The statute required that reasons offered to justify an exceptional sentence could not rely upon factors which were otherwise used in computing the initial sentencing range. *Id.* The judge chose to impose an exceptional sentence of 90 months as it was the court's opinion that petitioner acted with "deliberate cruelty." *Id.* at 300.

This Court unhesitatingly applied a variation of the *Apprendi* rule whose implications, Petitioner argues, goes beyond the rule of law applied in *Harris* and thus, the holding in *Blakely* serves to effectively overrule *Harris*. Initially in its opinion, this Court applied the *Apprendi* rule. However, when faced with respondent's argument that the sentence imposed was within the maximum statutory range of 10 years for a B-felony, the Court amended the *Apprendi* language by holding that "in other words, the relevant "statutory maximum" is not the maximum a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, supra, §87, at 55, and the judge exceeds his proper authority." *Blakely*, 542 U.S. at 304. This pronouncement significantly changes the "*Apprendi*" standard from the one relied upon in *Harris*.

Primarily, the Court's citation to Bishop clearly indicates that the Court moved away from the emphasis it

placed in *Harris* on the distinction between an element and a sentencing factor. Rather, by including this reference, as well as shortening the "ceiling" in its definition of "statutory maximum," the Court has radically moved closer to embracing the arguments made by Justice Thomas in *Apprendi*, i.e., that a "crime includes every fact that is by law a basis for imposing increasing punishment." See, *Apprendi*, 530 U.S. at 510-517(Thomas, J. concurring)(discussing the common law definition of a "crime"). Thus, the so-called sentencing factors in *Harris*, i.e., brandishing or discharging a firearm under §924(c) are, after *Blakely*, arguably within the reach of *Apprendi* as they are facts that certainly provide for an increase in punishment. *Apprendi*, 530 U.S. at 483, n.10 (when a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is "by definition [an] element of a separate legal offense. Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed).

By requiring that the statutory maximum be equated with facts reflected in the jury's verdict or admitted by the defendant, this Court pronounces a rule that is significantly different than the one relied upon in *Harris*. The Court in *Harris* relied upon the pre-*Blakely* definition of statutory maximum in order to distinguish a statutory minimum from a statutory maximum for *Apprendi* purposes. Thus, the holding in *Harris* is significantly undermined as the *Harris* court repeatedly reiterated that because the "ceiling" was the statutory maximum, a sentencing court was within its discretion to sentence anywhere below it. After *Blakely*, it can no longer be argued that facts increasing a minimum sentence are permissible simply because they "do not increase the penalty for a crime beyond the prescribed statutory maximum." Rather, in determining whether facts increasing a mandatory minimum are permissible, a court must evaluate whether the desired facts are reflected in the jury verdict or admitted by the defendant. If they had not been part of the case in chief or admitted by the defendant, then a court cannot consider them in calculating the appropriate sentence. Therefore, with respect to sentencing considerations, *Blakely* equally raises the bar for sentences

above the statutory maximum as well as the statutory minimum. Under *Blakely*, the justification under *Harris* for limiting constitutional protections against increases in mandatory minimums no longer applies as the level of judicial discretion (ability to sentence anywhere within the range up to the statutorily prescribed maximum) has been greatly diminished with the revised definition of "statutory maximum." In fact, with the statutory maximum now exclusively tied to the facts submitted to a jury, a strong potential exists that the facts supporting a mandatory minimum could conceivably become the maximum, as the upper designation of life can no longer be automatically relied upon as the statutory maximum. Thus, *Harris* is no longer good law after *Blakely*.

II.

AS THE MANDATORY NATURE OF STATUTORY MINIMUM SENTENCES SUFFER FROM THE SAME CONSTITUTIONAL INFIRMITIES AS THE MANDATORY NATURE OF THE FEDERAL SENTENCING GUIDELINES, THE COURT'S HOLDINGS IN *BOOKER* AND *CUNNINGHAM* EFFECTIVELY OVERRULED *HARRIS*.

In *Booker v. United States*, the jury found that respondent possessed 50 grams of cocaine with intent to distribute in violation of 21 U.S.C.§841(a)(1). This statute provided for a minimum of 10 years and a maximum of life. The Federal Sentencing Guideline ("Federal Guidelines") prescribed a sentencing range of 210 to 262 months. The judge found, by a preponderance of the evidence that respondent possessed an additional 566 grams of crack. Under the Federal Guidelines, this finding mandated a sentence of 360 months to life. The judge imposed a sentence of 360 months-within the maximum of a life sentence for possession with intent to distribute 50 grams or more as found by the jury, but well above the maximum of 262 months for the 50 grams of cocaine as determined by a jury. *Booker*, 543 U.S. at 226.

This Court held that as the Federal Guidelines were mandatory and binding on all judges, they effectively forced a judge to rely on facts not reflected in a jury's verdict which uncontrollably inflated a defendant's applicable guideline range. *Booker*, 543 U.S. at 235. Thus, due to the mandatory nature and thereby, "force and effect of laws," the Federal Guidelines were in patent violation of a defendant's Sixth Amendment rights. Thus, by implicating the "mandatoriness" of the Federal Guidelines, the Court had in effect, overruled its prior holdings in *McMillan* and *Harris* where the lower courts were mandated by the legislature to impose mandatory minimum sentences. As the Court in *Harris* pointed out, mandatory minimums were created by Legislatures, who were "dissatisfied with sentencing disparities and implemented measures regulating judicial discretion. These systems maintained the statutory ranges and the judge's fact-finding role but assigned a uniform weight to factors judges often relied upon when choosing a sentence." *Harris*, 536 U.S. at 558. See also, *McMillan*, 477 U.S. at 88(simply took one factor that has always been considered by sentencing courts to bear on punishment...and dictated the precise weight to be given that factor).

Thus, as it is undeniable that mandatory minimums have the same effect on sentencing judges as the pre-*Booker* Guidelines, *Booker's* repudiation of the mandatory nature of the Guidelines also holds for mandatory minimums, and as such, *Harris* is again overruled. See, *Booker*, 543 U.S. at 234(if the guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of a particular sentence in response to differing sets of facts, then their use would not implicate the Sixth Amendment); see also, *Cunningham v. California*, 127 S.Ct. at 867(no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue in *Blakely*. Both systems were mandatory and imposed binding requirements on all sentencing judges).

In addition, the *Booker* Court provides further support to Petitioner's argument that this Court has expanded beyond the distinction made in *Harris* between the Sixth Amendment's differing application to minimum and maximum sentences. In

summarizing its holding in *Blakely*, the *Booker* court relied upon Bishop's common law definition of "element" as first mentioned in *Apprendi*, when it stated that "the [*Blakely*] court held that the application of the Washington Sentencing scheme violated the defendant's right to have the jury find the existence of *any particular fact that the law makes essential to his punishment*." *Booker* 543 U.S. at 232 (Emphasis added). The *Booker* court again indicates that its holdings since *Harris* included all, rather than just maximum increases in sentences, when it stated that "the right[a jury determination] is implicated whenever a judge seeks to impose a sentence that is not solely based on facts reflected in the jury's verdict or admitted by the defendant." *Id.* The Court chose not to equate the term "sentence" with "maximum" and thus, referred to sentences generally, including minimum sentences. Most broadly of all, the *Booker* court, in reply to the government's argument that the *Apprendi* rule applied to a statute rather than a Guideline scheme, held:

> more important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. Those principles are unquestionably applicable to the Guidelines. They are not the product of recent innovations in our jurisprudence, but rather have their genesis in the ideals our constitutional tradition assimilated from the common law…'to guard against a spirit of oppression and tyranny on the part of rulers…trial by jury has been understood to require that the trial by jury as been understood to require the truth of every accusation…should afterward be confirmed by the unanimous suffrage of 12 of [the defendant's] equals and neighbors.

Booker, 240.

Thus, the *Booker* court reaffirmed the Sixth Amendment's supremacy over distinctions, including "recent innovations" like mandatory minimums. See, *Harris*, 536 U.S. at 560 (mandatory minimum statutes like the Pennsylvania Act,

which alter the minimum sentence without changing the maximum, were for the most part the product of the 20th Century); *Id.* at 580 (Thomas, J. dissenting)(the Court has not previously suggested that constitutional protection ends where legislative innovation or ingenuity begins).

In its most recent holding, this Court in *Cunningham v. California* has further reinforced Petitioner's argument that *Harris* has been undermined and is no longer good law.

In *Cunningham*, this Court held that California's determinate sentencing law that assigned the authority of finding facts exposing a defendant to an elevated upper sentence, was identical in important respects to Washington's determinate sentencing law in *Blakely* and the Federal Sentencing Guidelines in *Booker*. The Court concluded that all three of these systems violated the Sixth Amendment by allowing the judge to increase sentences beyond those permitted by the jury's conviction. In particular, California's Determinate Sentencing Law ("DSL") directed that a sentencing court start with a middle sentencing term and move from that term only when the court itself found by a preponderance of the evidence, facts that go beyond the elements of the charged offense. *Cunningham*, 127 S.Ct. at 867. The Court held that under the Sixth Amendment, any fact that exposed a defendant to a longer sentence must be found by a jury, not a judge and be established beyond a reasonable doubt. *Id.* at 868. Again, the Court's broadened reading of the *Apprendi* rule is reflected in its summarization of its *Blakely* holding: "Broad discretion to decide what facts may support an enhanced sentence or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth amendment requirement is not satisfied." *Cunningham*, 127 S.Ct. at 874.

As with *Booker*, the Court reaffirmed its distaste with the manditoriness of sentencing schemes. *Cunningham, Id.* at 875. The Court held that the DSL did not resemble the advisory system the *Booker* court had in mind. Under the DSL, judges were not free to exercise their discretion to select a specific

sentence within a defined range. Rather, they were required to choose between three fixed sentences without ranges between them. Judges were forced to first choose the middle range unless the judge found one or more facts in aggravation or mitigation. If so, the judge could increase the sentence to 16 years or decrease it to six. *Id.* at 867.

California argued that 16 years was the maximum for *Apprendi* purposes. The Court rejected this claim and held that the middle term, 12 years was the maximum. *Blakely*, 542 U.S. at 303 (maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant). This same "triad" arrangement exists in §924(c) with the default sentence being five years for possession. See, §924(c)(1)(A)(i). Judges were thus without a sentencing range to choose from and like the Washington Sentencing scheme and the Federal Guidelines, were forced to impose the statutorily prescribed sentence. If, by a preponderance of the evidence, a judge found that a defendant "brandished" a firearm, they were mandatorily required to impose the enhancement sentence of seven years. See, §924(c)(1)(A)(ii). Thus, for the same reasons underlying *Blakely*, *Booker* and *Cunningham*, the mandatory minimum scheme of §924(c) must also fall as the explicit holdings and rationale underlying these cases irrefutably overrules this Court's holding in *Harris*. *Booker* 543 U.S. at 642-645 (the Sixth Amendment right to trial by jury is violated where under *a mandatory guideline system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury)(Emphasis added).

APPLICATION TO THE FACTS AT BAR

In applying the preceding analysis to the facts at bar, the District court illustrated that it clearly understood this Court's holdings in *Blakely* and *Booker* when it deferred to the jury a determination of whether Petitioner possessed or brandished a firearm beyond a reasonable doubt. This deference reflected the District court's belief that "brandishing" was not merely a sentencing enhancement left to the court's sole determination,

but rather was a fact "which the law makes essential to the punishment" and thus warranted the Fifth and Sixth Amendment protections of a reasonable doubt finding by a jury. In this case, after hearing evidence presented by the Government, the jury determined that Petitioner possessed rather than brandished a firearm. The District court judge recognized that in finding possession, the maximum sentence he could impose was five years as this was the maximum "reflected in the jury['s] verdict." The judge however, second guessed his better judgment and imposed a seven year sentence based upon his own finding of brandishment at the much lower evidentiary standard of preponderance of the evidence. The District court felt bound to respect it superior court, the Ninth Circuit who had also expressed its own reservations in *United States v. Dare* of whether the holdings in *Harris* did in fact, survive after *Blakely* and *Booker*.

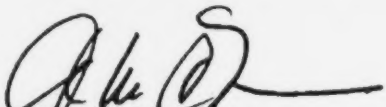
Petitioner argues that the District Court and the Ninth Circuit's intuition, as well as the intuition of other Circuits across the country, were accurate in surmising that *Harris* did not survive this Court's more recent holdings thereby affecting Petitioner's Fifth and Sixth Amendment rights. Thus, Petitioner respectfully requests that this Court address the validity of *Harris* in light of these more recent opinions in *Blakely* and *Booker* which we submit have in fact overruled *Harris*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Dated: April 5, 2007

Respectfully submitted,
Law Offices of Ann C. Moorman



Ann C. Moorman
Attorney for Petitioner
Reginald Akins

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. REGINALD AKINS, Defendant – Appellant.	No.06-10168 D.C. No. CR-01-00435-1-CRB **JUDGMENT**

Appeal from the United States District Court for the Northern District of California (San Francisco).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED.**

Filed and entered 01/09/07

A TRUE COPY
CATHY A. CATTERSON
Clerk of Court
ATTEST

JAN 31 2007

By: s/ _____
Deputy Clerk

FILED
07 FEB- 5 PM 12:46
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
JAN 09 2007
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNTIED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. REGINALD AKINS, Defendant – Appellant.	No. 06-10168 D.C. No. CR-01-00435-1-CRB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted December 8, 2006**
San Francisco, California

Before: T.G. NELSON, GOULD, and CALLAHAN, Circuit Judges.

Reginald Akin was convicted of two counts of bank robbery and two counts of using a firearm during the robberies. He challenges the additional two years he received based on the

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

court's finding that a firearm was brandished, which increased the mandatory minimum sentence from five years to seven years.[1]

Akins's challenges to his sentence are controlled by our opinion in *United States v. Dare*, 425 F.3d 634 (9th Cir. 2005). There we upheld the continued use of mandatory minimum sentences based on judicial factfinding as allowed by the Supreme Court's opinion in *Harris v. United States*, 536 U.S. 545, 568 (2002), despite the Supreme Court's subsequent decisions in *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005). *Dare*, 425 F.3d at 641; *see also United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005) (noting: "*Booker* does not bear on mandatory minimums"). Thus, the jury's verdict did not preclude the court from determining for the purpose of sentencing Akins within the statutory range that Akins had brandished a weapon. *See United States v. Watts*, 519 U.S. 148, 156 (1997) (holding pre-*Booker* that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence.").

We reject Akins's request that we overrule *Dare*. As a three-judge panel we may not overturn circuit precedent, and may only "reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue." *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). There has been no intervening Supreme Court decision that would justify a reexamination of *Dare*.

For the above reasons, the judgment of the district court is AFFIRMED.

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[1] Because the parties are familiar with the factual and procedural history of this case, we do not recount it in detail here.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

REGINALD AKINS,
Defendant.
_____/

No. CR 01-00435 CRB

ORDER
RE: RESENTENCING

Defendant Reginald Akins was convicted of two counts of armed robbery, two counts of use of a firearm in furtherance of a crime, and felon in possession of a firearm. Although the jury found under the reasonable doubt standard that Akins merely used, rather than "brandished" a weapon during the offense, the Court found for sentencing purposes, under the preponderance of the evidence standard, that Akins brandished the weapon. The Court's finding resulted in a mandatory minimum sentence.

The Ninth Circuit affirmed Akins' conviction and sentence in an unpublished memorandum. United States v. Akins, 102 Fed. Appx. 88, 2004 WL 1398595 (9th Cir. May 11, 2004). Akins filed a petition for certiorari to the United States Supreme Court. While that petition was pending, the Supreme Court decided United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), and subsequently granted Akins' petition. The Supreme Court ordered the case remanded to the Ninth Circuit for consideration in light of Booker.

On July 26, 2005, the Ninth Circuit Court of Appeals remanded this action to this Court "for the purpose of determining whether the sentence imposed would be materially different under Booker, 125 S. Ct. 738." Although the government had previously submitted a brief to the Court of Appeals that argued that remand was unwarranted in light

of the Supreme Court's decision in Harris v. United States, 536 U.S. 545 (2002), the Ninth Circuit's remand order makes no mention of Harris or the government's argument.

Then, on September 23, 2005, the Ninth Circuit decided United States v. Dare, 425 F.3d 634 (9th Cir. 2005). Dare held that under Harris, sentencing a defendant to a mandatory minimum based on judge-found facts does not violate the defendant's Sixth Amendment rights provided the sentence is not beyond the statutory maximum. 425 F.3d at 640-41. The court agreed that Harris "is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence," id. at 641, but nonetheless held that it must follow Harris because it has not been expressly overruled by the Supreme Court. Id.; see also id. at 643-48 (Bea, Circuit Judge, Dissenting) (concluding that Harris is not good law after Booker).

This Court, too, agrees that Harris cannot be reconciled with Booker and is therefore not good law; thus, if it had the discretion to do so, it would resentence Akins. As a district court, however, the Court is bound by Dare. Because Dare is on all fours with this case, the Court concludes that is does not have the discretion to resentence Akins until the Ninth Circuit orders otherwise.

IT IS SO ORDERED.

Dated: March 8, 2006

s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

FILED
JUL 26 2005
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff – Appellee, v. REGINALD AKINS, Defendant – Appellant.	No. 03-10053 D.C. No. CR-01-00435-CRB Northern District of California, San Francisco ORDER

Before: B. FLETCHER, TROTT, and FISHER, Circuit Judges.

Pursuant to *Akins v. United States*, 125 S. Ct. 1014 (2005), the Appellant seeks remand and re-sentencing in light of *United States v. Booker*, 125 S. Ct. 738 (2005). In accordance with the procedures outlined in *United States v. Ameline*, No. 02-30326, 2005 WL 1291977, *11 (9th Cir. June 1, 2005) (en banc), we remand Akins' sentence for the purpose of determining whether the sentence imposed would be materially different under *Booker*, 125 S. Ct. 738.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
v.)
) NO. CR 01-0435 CRB
REGINALD AKINS,)
)
Defendant.)
)

San Francisco, California
Wednesday, February 1, 2006

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Assistant United States Attorney

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Reported By: Belle Ball, RMR, CRR, CSR #8785

WEDNESDAY, FEBRUARY 1, 2006

THE CLERK: Calling 01-0435, the United States of America versus Reginald Akins. Appearances, Counsel?

MS. BADGER: Good afternoon, Your Honor. Susan Badger for the United States.

MS. MOORMAN: Good afternoon, Your Honor. Ann Moorman on behalf of Mr. Akins. Present, he is in custody.

I just need a moment to speak with him, if I may.

THE COURT: Yeah.

(Off-the-Record discussion between Defendant and Counsel)

THE COURT: Let the Record show the parties are present. This matter is on, I guess, on -- it has been sent back to me --

MS. BADGER: Yes.

THE COURT: -- for consideration. It is a post-appeal sentence.

MS. BADGER: Yes, Your Honor. It was remanded by the Ninth Circuit for the purpose of determining whether --

THE COURT: The sentence was appropriate.

MS. BADGER: -- the sentence would be materially different under Booker.

THE COURT: Well, you know, I'll tell you what I'm inclined to do. What I'm -- what I'm inclined to do is to sentence the Defendant to a total of 360 months, as distinct

from 384 months. In other words, run the -- the 60-month on Count 3 consecutive to the 25-year sentence, as distinct from -- I don't know what I did the last time, but I think that that was the objection, the last time I ran it, what, consecutive to --

MS. BADGER: Well, it sounds like the Court -- the last time, Your Honor, you sentenced Mr. Akins on the first bank robbery to one day, on the second bank robbery to one day, and the felon in possession count to one day.

And then, the first 924(c), the Court made a finding that Mr. Akins brandished the firearm, and imposed the mandatory minimum sentence of 84 months or seven years. And then, on the second 924(c), imposed mandatory minimum of 25 years, and ran them consecutive.

THE COURT: So in other words, the issue is -- and Ms. Moorman points it out -- is that the jury didn't find a brandishing, I found the brandishing, based upon the evidence that I heard.

But it's her objection that this should have been a jury determination, and if it had been, since it hadn't been, I should not impose -- I shouldn't impose the brandishing part of it. That's the point, isn't it?

MS. MOORMAN: Yes.

THE COURT: Yeah. So, you know, normally, one would say a 24-month difference is a big difference. In this case, obviously it is not a big difference, except I'm sure it is a

difference to the Defendant. You know, realistically, it is a 20-month difference. What ultimately happens to the Defendant, I don't know.

But I think that there is something to be said for giving him a sentence that doesn't include the brandishing. Even though I saw evidence of brandishing, it was not a jury determination. And so, I -- I think he is entitled to resentencing.

Is it material? Well, it is to him.

MS. BADGER: Well --

THE COURT: It is hard to look at something and say, well, 24 months, two years is not material. But in the larger picture, arguably it is not, but I think he is entitled to what I consider to be a correct sentence, a legally correct sentence. I know the Government takes -- the Government has well stated their position.

Normally I might agree with all those positions, but because of the sentence, because of the -- what is being imposed here, and by virtue of the fact that I don't -- I'm not viewing this case as precedential in any of the other cases that I deal with, it is just overall what is a reasonable sentence in order to accomplish the goals, I think a 360-month sentence as distinct from a 384-month sentence is more reasonable.

Maybe --

MS. BADGER: Well, the Court made a finding that by a

preponderance of the evidence, based on what the Court heard at trial, that --

THE COURT: Right, I'm vacating that finding. Or I'll leave the finding as it is, but if I just leave the finding as it is and say in light of Booker, the Court believes that -- and not wanting to assert a sentence that is more than is absolutely necessary, that I believe the 360 months is appropriate.

Now, is that legally erroneous?

MS. BADGER: I think --

MS. MOORMAN: Well, I think -- excuse me.

THE COURT: Everybody seems to be shaking that their head that I shouldn't do this.

MS. BADGER: Well, I think it is legally erroneous under Harris, Your Honor, which is directly on point. And as the Ninth Circuit found in Dare, is controlling under these circumstances. Harris was not overruled by Booker or Blakely or --

THE COURT: But it could be. I mean, the problem is, is it -- you know, I don't think -- well, yeah, maybe I could

MS. MOORMAN: Can I just briefly be heard on this very precise subject?

THE COURT: You can take all the time. Because maybe what ultimately might happen that is Mr. Atkins (sic) will come back again, over something that isn't going to make, really, any difference in his life and law enforcement's life, in anybody's

life, back and forth and back and forth. To what end? 360 months. Where I come from, that's 30 years.

How old are you, Mr. Atkins?

THE DEFENDANT: Thirty-five now.

THE COURT: Really. Does anybody care? I mean, this is -- basically he's been given a life sentence. Maybe he can -- something that could happen over a period of time that will give him some -- down the road, something can happen that would get him out. I don't know.

But I don't know that we ought to spend hours debating what kind of life sentence he's going to get. There must be some way just to do this, and not be concerned about it for the future. I said that it had no precedential value. But if you are going to appeal it, then of course I have to -- I have to go through this whole process.

MS. MOORMAN: Harris doesn't --

THE COURT: Harris. Was it effectively overruled? Now, with the composition of the Court as it is today, do I have to be concerned, you know, what's going to happen, so forth? I understand that can be said in any case in front of me, but -

MS. BADGER: Well, I mean --

THE COURT: I'm just trying to figure out what kind of life sentence we want. What kind of life sentence would you accept without appealing it?

MS. BADGER: Well, I personally can't answer that

question. That's up to the Department, Your Honor. But clearly, you would be in a position or you are in a position of speculating about what the Supreme Court might do the down the road, and in Dare the Ninth Circuit --

THE COURT: I guarantee you the Supreme Court, they would be speculating. I have no idea, and they don't, either, until a case is presented.

MS. BADGER: But in Dare, the Ninth Circuit, they understood that the defendant in that case was inviting the Court to make a finding that there was an inconsistency, and that Harris was overruled, but they expressly declined to take that invitation, and spoke of the precedential value of Harris.

THE COURT: Okay, maybe I have to wait. Maybe I have to wait, and Mr. Atkins can come back here. He will be around, after all, and maybe that's a legally correct policy. I don't actually think it is going to make any difference.

In other words, I simply say it is not going to materially change the sentence until or unless Harris is overruled. And if it is, then it would change it, and then I would resentence Mr. Atkins. I could do that. It makes no difference, really.

MS. MOORMAN: Well, I don't think --

THE COURT: That's my whole point, anyway.

MS. MOORMAN: I don't think you -- I don't think the Court should feel like it is being pushed in a corner of trying

to be clairvoyant about whether or not Harris will be overruled in the near future. I think if you -- what you have been asked to do on remand is to determine in light of Booker whether there would be a material or different -- materially different sentence imposed.

And, so that requires some retrospective visit to the circumstances that were at play when he was initially sentenced.

THE COURT: That is true, but the problem is, is that the answer is actually no. The problem is that there is no real material difference between 36 --

MS. MOORMAN: I think two years is a difference.

THE COURT: Yeah, but between 360 months and -- and 384 months, no. I mean, that's the practical answer, is that there is no material difference.

MS. MOORMAN: I'm not sure that -- then I'm going to disagree on the Court's interpretation of "material."

THE COURT: Okay.

MS. MOORMAN: And I don't know that that -- that word has, you know, been defined in the case law after Ameline goes up twice.

But I think one of the options available to you today, you know, on -- and I am going to ask you to impose a 30-month -- or a 30-year sentence -- is that at the time the Court made the finding that the facts supported brandishing, the case law was not developed as it is today. You did not have the benefit

of Blakely, you did not have the benefit of the Supreme Court's interpretation of Apprendi via Booker, and I think the Court would not have made the finding of brandishing, had you had the benefit of the guidance set down by the Supreme Court in Booker.

You would have, given the weight of the jury's finding as to possession, a more significant weight, and would have refrained from making a finding of brandishing.

THE COURT: Here is the problem, practically speaking, is that as I sit here today, I can't remember with the clarity that I could after a trial, whether and to what extent I was convinced that brandishing had occurred. I mean, obviously I believe brandishing occurred, and I made a finding by the preponderance of the evidence.

Would I have -- would I have made -- and that's a rather interesting thing, anyway, by finding the preponderance of the evidence, because the circuit law at that time was probable that if it was going to be a substantial difference between the sentence that would be imposed with the sentencing factor and without the sentencing factor, I would have to find by clear and convincing evidence.

So, I think I probably thought it's not -- it's not going to make a big difference in the sentence, as I think today it doesn't make a big difference, because two years always is important, but -- but it's not so important between 32 years and -- and 30 years. Its marginal difference is very slight.

It's very slight. So I would not have applied a clear and convincing test.

Now, your argument of course is, under Blakely, basically, it -- it would have been a jury determination, is that right?

MS. MOORMAN: Yes. And I -- and I disagree with the Government's assessment that Blakely only affects guideline sentences. Blakely doesn't just affect guideline sentences.

Yes, the holding in the matter declared the federal sentencing guidelines unconstitutional, and then created a remedy for future sentencings, but the broad reading of the case and the correct reading of the case is that a fact not found by a jury beyond a reasonable doubt or not admitted by the defendant cannot be used to enhance a sentence.

And that's exactly what was done in this case. And so, I think -- it doesn't have, it is not solely read in the context of the federal sentencing guidelines. So -- because it was previously applied, as we know, to the state guidelines from the state of Washington.

I think then you would not have, at the time, given the case law as it exists today, found a brandishing element and sentenced in accordance with it. And so I'm asking you to vacate the finding, and sentence in accordance with the jury's verdict.

THE COURT: Well, when you say "vacate the finding,"

are you saying that I would have to --

MS. MOORMAN: Or you have to find the finding to be moot, with all due respect. It's -- it would not control your sentencing determinations.

THE COURT: In other words I would have to find – I would have to find that it is not a factor that I'm going to consider in setting the sentence.

MS. MOORMAN: Yes.

THE COURT: It's contested. It was contested. And, therefore, I don't have to -- I don't -- do I have to have a hearing on it? Is the Government entitled to a hearing?

MS. BADGER: Well, we had a trial on the matter, Your Honor.

THE COURT: No, you didn't have a trial on whether -- you didn't have a trial on -- we had a trial on all the evidence.

MS. BADGER: Yes.

THE COURT: But the jury made no finding as to the brandishing.

MS. MOORMAN: Yes, it did -- well, it rejected it. There was a special verdict submitted, and they found the Defendant possessed the weapon. And signed the verdict form.

MS. BADGER: I might --

THE COURT: Well, were they given the option?

MS. MOORMAN: Yes.

THE COURT: See, I don't remember this.
MS. MOORMAN: Yes, there's verdict forms.
THE COURT: The verdict forms. And the verdict form had -- there was a verdict form which said brandishing?
MS. MOORMAN: There were special verdicts, one as to the issue of -- on the 924(c) counts, whether the Defendant possessed the firearm or brandished the firearm.
They found, true, the allegation that he possessed the firearm. And therefore, I imagine, disregarded -- did not sign the verdict form regarding brandishing.
MS. BADGER: This was an issue on direct appeal, Your Honor. And it was raised, and the Ninth Circuit held that it affirmed this Court's finding, despite the fact that the jury had --
THE COURT: Oh, okay. Well, there is no disagreement as to the facts. That is, the jury did not find beyond a reasonable doubt that the Defendant brandished the weapon.
MS. MOORMAN: Yes.
THE COURT: So, I found by a preponderance of the evidence, that the Defendant did.
MS. MOORMAN: Yes.
MS. BADGER: Yes, and you put that in your sentencing memoranda. And when I look at the pre-sentence report that recounts the facts elicited at trial, and maybe this would refresh the Court's recollection, the evidence was that the

suspect grabbed one of the bank tellers, who was seven months pregnant at the time, put her in a headlock, pulled out a revolver handgun, and pressed it against her temple. So --

MS. MOORMAN: Which were all findings I objected to at sentencing, the -- putting the teller in the headlock, putting the gun to her temple were all findings that you said you would not consider. And that is in the transcript that I attached in my memorandum.

So we can't go back and now urge you to use findings that at the time, you said you wouldn't consider.

THE COURT: If I said I wouldn't consider it, how did I do it?

MS. MOORMAN: Because I raised factual objections to the presentence report, to exactly that. And you said, "Ms. Moorman, I am not going to rely on the allegations that the teller was in a headlock and a gun was pressed to her temple, in imposing the sentence. So I don't have to rule on your objections."

And you didn't. That was clearly a proper way to dispose to those discrete factual objections to the presentence report, instead, because he had been convicted of armed bank robbery. And the guidelines would have added points to those two allegations.

And you said, "I'm not going to consider those factual allegations, so I'm not going to rule on your objections."

And that has -- frankly, I think now we have digressed far and away from the brandishing issue, because -- the brandishing issue was not decided at the time of sentencing. The Court, at the conclusion of the trial, when the verdicts had been rendered, and accepted them, and discharged the jury, made a finding on the brandishing at a separate time.

And so -- and frankly, Your Honor, I was there, and I don't have a perfect recollection, but my recollection is that you did not make a long statement on the Record of what supported it, except that you noted the distinction between the standards of proof. One being when the verdict form was submitted to the jury, they are controlled by a proof beyond a reasonable doubt standard; they are now, they were then.

They clearly found that he possessed the firearm, according to proof beyond a reasonable doubt; you noted when you made the finding of brandishing, that you weren't bound by that standard.

Now, on direct appeal, the issue was taken up, but also at the time of the direct appeal, not even the Ninth Circuit had the benefit of the Blakely and Booker opinions. The case stayed up in the Supreme Court for a year, before all of a sudden, it was in that rush of cases that came down to the Ninth Circuit after Booker. And, then the Ninth Circuit issued its remand in turn.

So, when the direct appeal was heard, they weren't

analyzing this Court's finding of brandishing versus possession in accordance with the Blakely and Booker decisions. They were basically in the same position you were, at the time. And, and frankly, and simply stated, things have changed.

MS. BADGER: Well, the Court -- first of all, the Court did issue a sentencing memoranda, a written sentencing memoranda where the Court stated "Because Mr. Akins brandished a firearm during the events charged in Count 3, the statutory minimum sentence on that count is seven years."

Now, this Court may not have had the benefit of Blakely and Booker when it sentenced Mr. Akins, but you

THE COURT: I know how -- I can tell you this --

MS. BADGER: Pardon me?

THE COURT: I can tell you this, Ms. Badger, that had I been aware of Blakely at the time I sentenced Mr. Atkins, and further, had the jury rejected the brandishing finding, notwithstanding my disagreement with the jury -- or maybe not, maybe I would have agreed with the jury. Maybe the jury, though I have no way of knowing, would say, oh, well, it was a preponderance of the evidence, but not beyond a reasonable doubt. Maybe that is what they thought, and therefore would agree with me.

Or maybe they thought, you know, it's -- there's not enough evidence at all even to be convinced on a probability basis. They might have thought that. I just know, I know

enough about myself to be comfortable in saying I wouldn't have imposed the brandishing.

MS. BADGER: Although --

THE COURT: Because having the jury hear it, having it being presented to the jury and the jury not adopted it, you know, I -- I wouldn't accept it.

I mean, I just -- I know that much about myself, is -- you know, now whether -- is that influenced by gee, he is doing 360 months, do I really want to give him a 384-month sentence? Is there something really important about that for the safety of the public, or for the -- I don't think so. For a 38-year-old person, or at that time, I guess, 35.

I don't -- I mean, I know what I would have done. I would have said forget it. That's what I would have done.

MS. BADGER: Your Honor, you did have the benefit of -- Harris was already decided by the time that you --

THE COURT: Not Blakely, right?

MS. BADGER: I'm sorry?

THE COURT: Not Blakely.

MS. MOORMAN: And as a matter of fact, I don't think Harris was either, in 2002.

MS. BADGER: Harris was decided --

MS. MOORMAN: In 2002.

MS. BADGER: 2002. You issued your sentencing memoranda February 4th, 2003. So --

MS. MOORMAN: The finding was made prior to that. I'm not necessarily disagreeing with you.

THE COURT: Well, when was Blakely decided?

MS. MOORMAN: Blakely was decided in 2004.

THE COURT: Yeah.

MS. BADGER: But Harris, Harris is directly on point. and that is the point that the Ninth Circuit made in Dare. Harris was the exact same circumstances where a defendant -- I can't remember in Harris whether the defendant pled guilty or was found guilty. But in any event, the issue of brandishing was contested.

The Court made a finding by a preponderance of the evidence. The defendant objected on appeal, and the Supreme Court held that the preponderance of the evidence finding, even if a jury didn't make that finding, did not violate the Sixth Amendment.

THE COURT: Let me ask you this, Ms. Badger. Harris, which you say is directly on point, --

MS. BADGER: Yes.

THE COURT: That case did or did not involve a submission to the jury of the issue of whether or not the defendant brandished a weapon?

MS. MOORMAN: It didn't. It did not, so the Record is clear.

THE COURT: That's my view. I think that is correct.

And if that's correct, I'm telling you now that's a different case than Harris. At least, I react to it differently.

MS. BADGER: Well, the fact that a jury -- I mean, this was addressed by -- on the direct appeal, and the Ninth Circuit's opinion on the direct appeal. The fact that a jury may not have found an element beyond a reasonable doubt does not prevent the Court --

THE COURT: Let me ask you this. Why is this case back here? In other words, what is there for me to consider, for goodness' sakes? What am I supposed to do? If you're right, then the Ninth Circuit's wrong.

MS. BADGER: Well, we did argue that to the Ninth Circuit.

THE COURT: Well, I don't -- but that's what I don't understand. If I am just supposed to impose, and I'm required to do so, the same sentence I gave him the last time, the Ninth Circuit's bright enough to figure that one out. I don't mean that in a facetious way.

I mean, I mean, they sent it back to me to do something. Why would they send it back to me to do something if legally I can't do it? I don't understand the argument. I mean, I'm not trying to quarrel with you, I'm just trying to figure out, what's going on?

I don't understand that. Maybe you can explain it to me. Don't have to do it right now, but I mean maybe I'll just

put it over a week, and you can think about it, and give you an opportunity to explain to me why they sent it back to me.

MS. BADGER: Well, I can't explain why -- I mean, the opinion or the memoranda sending it back was -- excuse me.

THE COURT: Well, then, you have to tell me, you have to tell me in the very least that -- well, I don't know. I don't know. I can't phone them. They thought I had to do something. They thought that I might do something differently.

MS. BADGER: The order reads, "We remand for the purpose of determining whether the sentence imposed would be materially different under Booker."

THE COURT: Okay, that, to me -- then that is their boilerplate. That to me suggests that they think I might impose a different sentence.

So let's say I say no, let's -- if I say no -- if I say yes, I would impose a different sentence, and they come back -- then I'm going invite you to take it up. Then they come back and they say you can't.

Let them do that. Let them do that. Come back and tell me I can't. And I'll say, "Fine. Why did you send it to me to begin with? I've got plenty to do."

MS. BADGER: Well, I think this -- the Court has to follow the law --

THE COURT: I'll put it over a week. I'll give you the opportunity to explain to me in a written form why you think

the Ninth Circuit sent it back to me under Ameline, and whether I have the -- whether I evinced what I'm supposed to do. That is what I'm going to do. Put you on the hot seat.

We'll put the Government -- well, you have got to explain it. Fine. If I buy your argument. Maybe I'll buy it; I don't know. But I don't understand how they can send it back to me and the Government take the position that legally you can't do anything, and it is clear you can't do anything different.

MS. BADGER: Okay.

THE COURT: Okay.

MS. BADGER: Your Honor, I'm not going to be in town next Wednesday. I don't know if you want to --

THE COURT: Two weeks. Well, I don't want to keep Mr. Atkins --

MS. MOORMAN: He's okay. He's all right where he is.

THE COURT: That is all right?

MS. MOORMAN: He doesn't object to a continuance.

THE COURT: You don't mind being --

THE DEFENDANT: (Shakes head)

THE COURT: Okay.

MS. MOORMAN: The next opportunity for me to be here on a Wednesday would be the 22nd.

THE COURT: Thank you. The 22nd.

MS. BADGER: So, we'll be here the 22nd?

THE COURT: Yeah. Just give me something to look at, at your convenience.

MS. BADGER: Okay, thank you.

THE COURT: All right. Ms. Moorman can respond. Okay? Just work out the schedule.

MS. MOORMAN: That's fine. We will.

THE COURT: Thank you very much.

MS. MOORMAN: Thank you.

(Conclusion of Proceedings)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in Case No. CR 01-0435 CRB, United States of America v. Reginald Akins, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

Belle Ball, CSR 8785, RMR, CRR

Thursday, May 18, 2006

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE
CHARLES R. BREYER, JUDGE

UNITED STATES OF AMERICA, PLAINTIFF, VS. REGINALD AKINS, DEFENDANT.	NO. CR-01-0435 CRB

WEDNESDAY, MARCH 8, 2006
SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Reported By: Joan Marie Columbini, CSR 5435
OFFICIAL COURT REPORTER

Proceedings; Wednesday, March 8, 2006

The clerk: Calling case CR 01-0345, the United States of America versus Reginald Akins.

Appearances, counsel.

Ms. Badger: good afternoon, your Honor. Susan Badger on behalf of the United States.

Ms. Moorman: Good afternoon, your Honor. Ann Moorman on behalf of Reginald Akins. He will be present. He is in custody.

(the Defendant entered the courtroom)

The Court: Okay. Let the record reflect the Defendant is present.

The Government takes the position that I have no discretion other than to impose the sentence that had previously been imposed. That's their position?

Ms. Badger: That's correct, your Honor.

The Court: And they cite to that United States versus Dare, a two-to-one decision, which essentially relied on Harris, which, as the dissent points out in Dare, is probably Not good law, but, nevertheless, the Ninth Circuit held that I had to follow the law, Harris as law.

you suggest, if I understand your memoranda correctly, that there really isn't a conflict because could find now that Mr. Akins didn't brandish a weapon, as that Term

is defined. I think that's essentially your argument, that I can make a finding that he didn't?

Ms. Moorman: Yes.

The Court: Well, the problem with that is I can't. I already made a finding that he did and that finding went up to the Ninth Circuit and was upheld. I can't just change -- I can't say, well, in light of that, I changed my mind, I didn't make the finding. I found it. You may disagree with the finding, but I found it. It's there. I decided it. I don't have all the evidence in mind two years later, but I don't think I was in doubt as to whether or not Mr. Akins brandished a weapon.

I made that finding. The finding is part of the case. It went to the Ninth Circuit. It was affirmed. I still think I'm right. It was affirmed, and now it's back here for sentencing.

The odd thing is why would they send this case back to me if I didn't have discretion to enter a different sentence? I would enter a different sentence. I mean, I think under all the circumstances and if I were to apply 3663(a) to the sentencing, I may very well enter a different sentence if I had discretion to do so. I don't think I do. I may be wrong. as a matter of fact, I hope I'm wrong, but I'm issuing an opinion today saying that I'm right -- or I don't know I'm saying I'm right. I'm saying I don't think I have discretion.

I agree with the Government's analysis and especially under U.S. v. Dare, I think my discretion is -- I think this issue is directly decided by Dare and by two-to-one vote. Dare is the law. Harris is the law. And there's no question the Ninth Circuit is the law. So under all of that, I don't feel I have discretion to enter a different sentence.

If I am wrong -- and I invite you to appeal. If I'm wrong, they'll send it back with instructions as to what I should do, which is fine.

I don't think it's prejudicing the Defendant because he's serving a rather lengthy sentence in any event. It's prejudicing him in the sense I'm not doing what you're asking me to do, but it's not going to result in some additional time as a result of the appeal.

So I think that's the direct way to handle your submission. I will sign an order today, and you can take it up or across, whichever direction one goes from here to the Ninth Circuit.

Ms. Moorman: For the record, your Honor, the objections that we preserved in this proceeding since the remand, were that, one, yes, this court does have the discretion to re-sentence Mr. Akins within the scope of the remand to a five-year mandatory minimum on count three rather than the seven.

I understand your ruling, and I accept it. But we

did also preserve for the record whether Harris is remains good law in light If United States versus Booker and the Blakely and Apprendi opinions as they have been interpreted, and so we will be accepting your invitation to take the matter up.

The Court: Be my guest. Thank you.

Ms. Moorman: Thank you.

Ms. Badger: Thank you, your Honor.

(Proceedings Adjourned.)

CERTIFICATE OF REPORTER

I, Joan Marie Columbini, Official Reporter for the United States Court, Northern District of California, hereby Certify that the foregoing proceedings in CR 01-0435 CRB, United States of America v. Reginald Akins, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the Court file.

JOAN MARIE COLUMBINI, CSR 5435, RPR

MONDAY, APRIL 24TH, 2006